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No. 85-140

In The
# Supreme Court of the United States
October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
*Petitioner,*

v.

MICHAEL HARDWICK and JOHN AND MARY DOE,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY ITS COMMITTEE ON SEX AND LAW IN SUPPORT OF RESPONDENT HARDWICK

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The Association of the Bar of the City of New York, by its Committee on Sex and Law, hereby submits its brief *amicus curiae* in support of respondent Michael Hardwick pursuant to Rule 36.2 of the Rules of the Supreme Court. The written consent of all parties hereto is being filed simultaneously with this brief.

## INTEREST OF AMICUS

The Association of the Bar of the City of New York (hereinafter "the Association"), chartered by the State of New York in 1871, is an organization of approximately 15,000 lawyers, most of whom practice or reside in the New York City metropolitan area. The Association has had a long-standing commitment to criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. The Association conducts its work through committees. The committee with jurisdiction of the subject matter of this appeal, the Committee on Sex and Law (hereinafter called "the Committee"), has been authorized by the Association to file this brief.

The Association has a deep interest in the outcome of this case. When the New York Court of Appeals considered whether the right of adults to engage in private consensual sexual conduct is protected by the federal Constitution in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981), the Association filed an *amicus* brief urging the court to find the New York consensual sodomy statute, New York Penal Law § 130.38, unconstitutional. As a consequence of the *Onofre* decision, private sexual conduct between consenting adults has been lawful in New York since 1980.

This brief is submitted because the Association, through the work of the Committee, recognizes that im-

portant issues of fundamental fairness and privacy affecting citizens of the State of New York as well as all citizens of the United States may be reached by this Court's consideration of this case. The federal constitutional right of privacy, as it relates to consensual, sexual activity between adults acting in private, is an issue implicated herein. A decision by the Court on this issue may well sweep beyond the State of Georgia to affect citizens in states such as New York, in which laws criminalizing private intimate behavior have been judicially stricken as unconstitutional.[1] Because the Association is concerned about the consequences of this case for the millions of citizens across the country whose interests might be affected, it wishes to present its views as *amicus curiae* in support of the decision reached below by the United States Court of Appeals for the Eleventh Circuit.

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[1] The courts of several states have previously held that statutes criminalizing private sex between consenting adults violate federal constitutional rights. *See State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (Iowa criminal sodomy statute invalidated); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (N.J. criminal fornication statute invalidated); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (Pa. Voluntary Deviate Sexual Intercourse Statute invalidated); *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981) (N.Y. consensual sodomy statute invalidated); *see also Doe v. Duling*, 603 F.Supp. 960 (E.D. Va. 1985) (Va. fornication and cohabitation statutes invalidated). In addition, twenty-two states have legislatively decriminalized consensual sodomy between adults in private. *Onofre*, 51 N.Y.2d at 491 n.5, 434 N.Y.S.2d at 95.

## PRELIMINARY STATEMENT

On August 3, 1982 respondent Michael Hardwick was arrested by the Atlanta police for violating the Georgia criminal sodomy statute, Off. Code Ga. Ann. § 16-6-2, with a consenting adult in the bedroom of his home. Section 16-6-2 provides, in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .[2]

After his arrest, Hardwick filed this suit in the United States District Court for the Northern District of Georgia seeking a declaration that § 16-6-2 was unconstitutional. Defendants moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Their motion was granted and Hardwick appealed. The United States Court of Appeals for the Eleventh Circuit reversed, holding that the statute infringed upon Hardwick's fundamental rights, and remanded for trial.

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2 The statute applies irrespective of the gender, marital status or sexual orientation of the parties to the offense.

## SUMMARY OF ARGUMENT

The Eleventh Circuit correctly determined that the right to freedom from unwarranted governmental intrusion into protected zones of privacy warrants remand of this case for trial. The two zones of privacy identified by this Court, privacy of the home and privacy in personal decisions relating to intimate association, were both invaded when the police arrested Michael Hardwick for engaging in consensual sex with an adult in his bedroom. Thus, the case should be remanded for consideration of the State of Georgia's interest in regulating such conduct and the narrowness of the language of § 16-6-2.

Several state courts of last resort have invalidated statutes criminalizing private consensual adult sex as violative of constitutional rights. Reversal of the decision below would undermine the decisions of these courts and could potentially recriminalize conduct that has been lawfully and regularly engaged in for years, subjecting millions of Americans to the danger of arrest and prosecution. Affirmance of the decision below, by contrast, would allow a determination of the validity of such statutes on a state-by-state basis, and avoid penalizing citizens of states whose statutes are not before this Court for review.

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## ARGUMENT

The decision below held that Off. Code Ga. Ann. § 16-6-2 infringed upon the fundamental constitutional rights of Michael Hardwick, because "[t]he activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation." 760 F.2d at 1212. The decision did not, however, invalidate the statute. Rather, it remanded the action to the trial court for determination whether a) the State of Georgia has an interest in regulating such activity sufficiently compelling to justify the statute and b) § 16-6-2 is a properly tailored means of safeguarding that interest. *Id.* at 1213. Thus, the court below did not reach the issue of the state's interest, if any, in regulating private adult sexual activity and its decision does not present that issue for review.

### I. HARDWICK'S ARREST FOR ENGAGING IN CONSENSUAL SEX WITH ANOTHER ADULT IN THE BEDROOM OF HIS HOME INFRINGED HIS FUNDAMENTAL RIGHT TO FREEDOM FROM UNWARRANTED GOVERNMENTAL INTRUSION

For many years this Court has recognized the fundamental constitutional right of American citizens to freedom from unjustified governmental intrusion into certain "zones of privacy." *Griswold v. Connecticut,* 381 U.S. 479 (1965). A century ago, in *Boyd v. United States,* 116 U.S. 616 (1886), the Court considered the scope of the Fourth Amendment mandate that "[t]he right of the people to be secure in their persons, [and] houses . . . shall not be violated." In invalidating a customs statute as violative of

this right, the Court relied on principles settled during the colonial period in *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [*T*]*hey apply to all invasions on the part of the government and its employes of the sanctities of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .

116 U.S. at 630 (emphasis supplied).

In 1928, Justice Brandeis, citing *Boyd* in *Olmstead v. United States*, 277 U.S. 438 (1928), set forth a classic statement of our right as Americans to freedom from governmental intrusion:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. *They sought to protect Americans in* their beliefs, their thoughts, *their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478 (dissenting) (emphasis supplied). The Brandeis view in *Olmstead* has since prevailed, *Katz v. United States*, 389 U.S. 347 (1967), and has been cited re-

peatedly in subsequent cases as the law of the land. *E.g. Winston v. Lee,* — U.S. —, —, 105 S.Ct. 1611, 1615-16 (1985); *Whalen v. Roe,* 429 U.S. 589, 599 n. 25 (1977); *Eisenstadt v. Baird,* 405 U.S. 438, 453 n. 10 (1972); *Stanley v. Georgia,* 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (Goldberg, J., concurring).

This constitutional "right to be let alone" has been recognized most frequently in two contexts: in private homes and in personal decisions concerning intimate association. Indeed, these are the two zones of privacy most clearly delineated by the decisions of this Court.

The fundamental sanctity of a person's home is manifest both from the text of the Constitution, *see* Third and Fourth Amendments, and from the cases holding unjustified governmental intrusions into the home violative of constitutional rights. The leading case, *Stanley v. Georgia, supra,* arose when a search of a home pursuant to a warrant obtained in connection with a bookmaking investigation uncovered pornographic films in Stanley's bedroom. Stanley was arrested and convicted of possession of obscene materials. Although the Court observed that the First Amendment does not generally protect obscenity, it recognized that Stanley asserted "the right to satisfy his . . . *emotional needs* in the privacy of his own home." 394 U.S. at 565 (emphasis added).[3] Accordingly, it held that

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[3] These "emotional needs" undoubtedly encompassed Stanley's "choice to seek sexual gratification by viewing" the films. *People v. Onofre,* 51 N.Y.2d 476, 487, 434 N.Y.S.2d 947, 950 (1980), *cert. denied,* 451 U.S. 987 (1981).

his possession of otherwise regulable films inside his home was protected from state interference. "Whatever may be the justifications for . . . statutes regulating obscenity, we do not think they reach into the privacy of one's home." *Id.*

This Court has interpreted *Stanley* as standing for a right of "privacy of the home," which Chief Justice Burger has characterized as "hardly more than a reaffirmation that 'a man's home is his castle.' " *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

A more recent exposition of the right to privacy of the home is contained in *Payton v. New York*, 445 U.S. 573 (1980):

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734.

*Id.* at 589-90. In holding that the police cannot make a routine felony arrest by entering a suspect's home without a warrant, the Court emphasized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Id.* at 601. Justice Blackmun, concurring, applied a balancing test to conclude, "The suspect's interest in the sanctity

of his home . . . outweighs the governmental interests." *Id.* at 603.

A second zone of privacy in which citizens enjoy constitutional protection from unwarranted governmental intrusion is the area of personal decisions concerning intimate association. *See generally* Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624 (1980). In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the Court struck down a statute which forbade the use of contraceptives by married people, on the ground that it infringed "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.[4] The right of privacy in personal decisions concerning intimate association was applied to protect unmarried persons in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), in which the Court held:

> [W]hatever the rights of the individual to access to contraceptives may be, *the rights must be the same for the unmarried and the married alike.*
>
> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relation-

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[4] The Court in *Griswold* was mindful of the fact that intimate association involving the use of contraceptives most often occurs in the home.

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy . . . .
>
> *Id.*

> ship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If *the right of privacy* means anything, it *is the right of the individual,* married or single, *to be free from unwarranted governmental intrusion into matters* so *fundamentally affecting a person* as the decision whether to bear or beget a child.

*Id.* at 453 (emphasis added).[5] More recently, this zone of privacy was held also to protect such decisions "fundamentally affecting a person" as the decision to terminate a pregnancy, *Roe v. Wade,* 410 U.S. 113 (1973), and to marry. *Zablocki v. Redhail,* 434 U.S. 374 (1978).

The inclusion of personal decisions to engage in intimate association within a constitutionally protected zone of privacy was reaffirmed and elaborated in *Carey v. Population Services International,* 431 U.S. 678 (1977). There, the Court, in striking down a criminal statute prohibiting the sale, advertisement and distribution of contraceptives under certain circumstances as violative of the right to make such personal decisions, observed that "the outer limits of this aspect of privacy have not been marked by the Court." 431 U.S. at 684. The Court expressed its solicitude for "a field that by definition concerns the most intimate of human activities and relationships." *Id.* at 685.

Necessarily implicit in the constitutional protection accorded to personal decisions concerning the most inti-

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[5] Indeed no foundation exists in either the text or the history of the Constitution for the suggestion that its protections might differ based on a person's marital status. Section 16-6-2, in any event, applies by its terms to married as well as unmarried citizens.

mate of human activities and relationships is protection for an adult's decision to engage in non-procreative sexual behavior in private. The right to use contraceptives recognized in *Griswold* and its progeny logically entails the right of the user to engage in non-reproductive sex. And, if users of contraceptives have such a fundamental right, so must all Americans. This rationale compelled the New York Court of Appeals, in considering the same issue, to conclude that "the right enunciated in *Griswold* . . . [was] to make decisions with respect to the consequences of sexual encounters and, necessarily, to have such encounters." *People v. Onofre*, 51 N.Y.2d 476, 487, 434 N.Y.S.2d 947, 950, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981). *See Doe v. Duling*, 603 F.Supp. 960, 967 (E.D.Va. 1985) ("[T]he constitutional right to privacy extends to a single adult's decision whether to engage in sexual intercourse.").[6]

Hardwick's arrest in this case demonstrates that § 16-6-2 intrudes on both of the constitutionally protected zones of privacy, each of which requires elevated scrutiny under applicable precedents. He was arrested for conduct which occurred in the privacy of the bedroom of his home. 760 F.2d at 1204. Under *Stanley, supra*, conduct in the home, particularly the bedroom, is entitled to special protection.

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[6] Although Justice Powell, concurring in *Carey*, wrote that the Court's decision "would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review," 431 U.S. at 703, this analysis applies only to private, consensual, non-commercial conduct between adults. Thus, although the instant case does not raise such issues, prostitution, coercive sex, sex with minors, and sex in public places fall outside of the protected zone due either to their public nature or to the fact that no voluntary personal decision is involved.

Moreover, he was arrested for engaging privately in intimate conduct with a consenting adult. Under *Griswold*, *Eisenstadt* and *Carey*, such conduct implicates a fundamental right. Thus, the statute as applied to Hardwick unquestionably invaded the two zones recognized by this Court as lying within the constitutional right to privacy.

## II. THE ELEVENTH CIRCUIT CORRECTLY REMANDED FOR DETERMINATIONS WHETHER 1) THE STATE OF GEORGIA HAS A COMPELLING INTEREST IN RESTRICTING PRIVATE ADULT INTIMATE CONDUCT AT HOME AND 2) THE CHALLENGED STATUTE IS PROPERLY TAILORED TO MEET THE STATE'S GOAL

Although statutes are not automatically invalid when they burden fundamental constitutional rights, they are subjected to a special standard of review. In cases involving such statutes, the Court has required states to justify the burden by demonstrating a compelling interest, and by showing that the statutory language is narrowly drafted to protect only that interest. *Carey v. Population Services International*, 431 U.S. at 686; *Roe v. Wade*, 410 U.S. at 155.[7] For this reason, the court below properly remanded for trial on these two issues, rather than invalidating § 16-6-2 as unconstitutional on its face. 760 F.2d at 1213.

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[7] In his concurring opinion in *Carey*, Justice Powell suggests that the "compelling state interest" standard should be applied to state legislation which "implicates sexual freedom . . . only when the state regulation entirely frustrates or heavily burdens the exercise of constitutional rights in this area." 431 U.S. at 705. Section 16-6-2 satisfies this standard because the flat criminalization of certain private intimate behaviors—with a minimum penalty of imprisonment for not less than one year—demonstrably "frustrates or heavily burdens" the exercise of constitutional rights.

In the present procedural posture, the Court is not being asked to invalidate Georgia's sodomy law, since the trial court might find that the statute satisfies the two-part test. Nor is the Court properly being asked to consider any reasons that may be advanced to justify the statute, since the state's justifications are not brought into question by the decision below. The only question presented here is whether the settled rights to privacy of the home and in intimate associations require a state to show compelling justification for a statute authorizing the arrest of citizens for engaging in intimate associations at home.

The approach urged here will simply allow the courts to determine, on a state-by-state basis, whether particular state statutes criminalizing private adult intimate behavior at home are justified under applicable constitutional standards. Accordingly, the decision below should be affirmed.

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## CONCLUSION

For all of the reasons stated above, the Association of the Bar of the City of New York urges the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit, and to remand the action to the District Court for trial.

Respectfully submitted,

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